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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 675

ENOS L. SEEDS AND JOHN DERHAM, JR., INDIVIDUALLY AND TRADING AS SEEDS & DERHAM,
Petitioners,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

WALTER BIDDLE SAUL,
Counsel for Petitioners.

SAMUEL E. EWING, JR.,
SAUL, EWING, REMICK & SAUL,
Of Counsel.

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THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Enos L. Seeds and John Derham, Jr., Individually and trading as Seeds & Derham, petitioners herein, respectfully pray for a writ of certiorari to the Court of Claims of the United States to review the judgment of that court entered in this case on October 7, 1940, and therefore show as follows:

I. Summary Statement of Matter Involved.

Your petitioners entered into a contract with the United States for the construction of a dam across the Ohio River

at Emsworth, Pennsylvania. The questions here involved arose from two provisions of the contract, as follows:

(1) The dam was to be constructed in front of and abutting against an existing dam, and the existing dam was to be used as the downstream arm of the coffer dams for the new work;

(2) The contractors, Seeds & Derham, were required to take the labor furnished by the United States Government Employment Office.

Your petitioners claim a breach of both of these provisions in the contract, in that the existing dam was so leaky and defective it could not be used as the lower arm of the coffer dams for the new work, and in that the Government failed to supply qualified labor.

Your petitioners presented a claim for damages resulting from the idle machinery and idle labor forced to stand by while the defective old dam was being repaired, and also a claim for the losses due to the unqualified labor which they were obliged to use, recovery for such losses having been specifically provided for by the Act of Congress of July 23, 1937 (50 Stat. 533, Chap. 520). There were also several comparatively small claims for damages in connection with various items of the work, one of such claims being for damages for delay by the Government in permitting petitioners to proceed with certain work on a lock wall.

The testimony in the case was taken at various hearings by two Trial Commissioners, one such Commissioner hearing the plaintiffs' case and the other the defendant's. On June 5, 1940, the case was argued and submitted on its merits to the United States Court of Claims. On October 7, 1940, the said court filed its Special Findings of Fact and Conclusion of Law, and rendered judgment for the plain-

tiffs in the sum of $183.12 for damages on the small claim relating to the lock wall.

In the majority opinion written by Judge Whitaker and concurred in by Judge Littleton and Chief Justice Whaley, the plaintiffs were refused damages on both main items of their claim. However, Judge Green filed a dissenting opinion with respect to the item under which plaintiffs claim damages for the Government's failure to supply qualified labor in accordance with the provisions of the contract, it being Judge Green's opinion that damages on this item should be allowed.

II. Relevant Parts of Statutes Involved.

The Act of February 13, 1925, 43 Stat. 939, Chap. 229, Sec. 3, as amended by the Act of May 22, 1939, 53 Stat. 752 Chap. 140 (U. S. C. A. Title 28, Sec. 288 and Supp.) with respect to review of decisions of the United States Court of Claims provides as follows:

> "(b) In any case in the Court of Claims, including those begun under section 287 of this title, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal.
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> "In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

A complete copy of the relevant provisions of said Act as amended is set forth in the Appendix hereto, at page 22.

With respect to the claim for damages for unqualified labor, the relevant provisions of the Act of July 23, 1937 (50 Stat. 533, Chap. 520, U. S. C. A., Title 28, Sec. 250 b.) are as follows:

> "Jurisdiction is conferred upon the Court of Claims to hear, determine, and enter judgments against the United States upon the claims of the several contractors for alleged excess costs incurred in the execution of their respective contracts, entered into since June 16, 1933, for the construction of locks and dams for the improvement of navigation on the Mississippi River and its tributaries, * * * by reason of the Government having failed, as alleged, to supply qualified labor under the labor clauses of the respective contracts, resulting in excess costs, including general overhead and depreciation, to the said several contractors on their respective contracts, as alleged; * * *"

A complete copy of said Act is set forth in the Appendix hereto at pages 22-23.

III. Statement of Questions Presented.

1. When the Government breaches a contract and in order to cure the breach gives the contractor a Change Order for work required to cure the breach, such Change Order failing to include any provision for the payment of idle labor and equipment forced to stand by while the breach was being cured, may such contractor recover the damages resulting from the idle labor and equipment, or can the Government refuse payment on the ground that in the contract it, the Government, reserved the right to modify the contract and that the Change Order issued to cure the breach was merely a modification of the contract?

The Court of Claims held that the contractor could not recover.

2. Have executive officers of the Government authority to entertain and settle claims for unliquidated damages; and is a contractor barred from recovering unliquidated damages by the refusal of an executive officer of the Government to allow a claim for such damages?

The Court of Claims seems to infer that the contractor's claim in the present case was so barred.

3. Under the provisions of the Act of Congress of July 23, 1937, providing that contractors may recover damages incurred by reason of the Government having failed to supply qualified labor under the labor clauses of Government contracts, is a contractor barred from recovering losses suffered as a result of the Government's failure to supply him with qualified labor because he should have anticipated that the quality of the labor would be poor and because he received the same type of poor labor that was supplied by the Government agency to other contractors on other contracts?

The majority of the Court of Claims held that the contractor was so barred.

IV. Reasons for the Allowance of the Writ.

The following reasons are relied upon for the allowance of the writ and are discussed briefly in the supporting brief.

1. Congress has provided that claimants should be permitted to recover in all cases in which they would have been entitled to recover had the Government been suable as an individual.

The Court of Claims in the instant case has denied a recovery although had the defendant been an individual, the law as laid down by this Court and the Appellate Courts

of the various States would have permitted a recovery. The decision of the Court of Claims is a departure from the rule as heretofore made by it, and is not in accordance with the decisions of this Court or in accordance with the decisions of the Appellate Courts of the various States in respect to the liability of the defendant who is guilty of a breach of contract. Any change in the law with respect to the liability of the Government to a contractor for breach of contract is vital to all persons having contracts with the Government.

2. The Court of Claims in its decision attempted to vest in the executive officers of the Government power to entertain and settle claims for unliquidated damages for breach of contract, contrary to the decisions of your Honorable Court.

If this power to pass upon unliquidated claims for damages for breach of contract is placed in the executive officers of the Government in charge of carrying out contracts, it places every contractor absolutely at the mercy of the contracting official, whoever he might happen to be, and would open the door to gross abuses.

3. The determination of the third question by your Honorable Court is necessary in the public interest so that authoritative pronouncement can be made respecting the construction to be given the Act of Congress of July 23, 1937. This Act has not been construed heretofore. The judges of the Court of Claims were divided in their opinions as to the meaning of the language of the Act, and as was said by Judge Green in his dissenting opinion, if the construction of the majority of the court should be adopted, the Act will become meaningless and useless. There are a number of proceedings pending in the Court of Claims involving the construction of this Act and it is in the public

interest that your Honorable Court should clarify any doubt which now exists as to its meaning.

WHEREFORE your petitioners respectfully pray that this petition for writ of certiorari to review the judgment of the Court of Claims of the United States be granted.

And your petitioners will ever pray.

ENOS L. SEEDS and JOHN DERHAM, JR.,
Individually and Trading as SEEDS & DERHAM,
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Philadelphia, Pa. January 3, 1941.